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No. 04-1084

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALBERTO R. GONZALES, Attorney General of the United States, et al.,

Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE THE TORT CLAIMANTS' COMMITTEE, *In Re Roman Catholic Archbishop Of Portland In Oregon, And Successors, A Corporation Sole,* AND THE OFFICIAL COMMITTEE OF TORT LITIGANTS, *In Re Catholic Bishop Of Spokane* IN SUPPORT OF NEITHER PARTY URGING REVERSAL

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STATEMENT OF INTEREST[1]

Each Amicus is a committee of tort claimants composed of individuals who were sexually abused as children by clergy. Each Committee was constituted within the context of a federal bankruptcy proceeding filed by the relevant Archdiocese or Diocese in response to its liability for clergy abuse. In both cases, the Archdiocese or Diocese has invoked the Religious Freedom Restoration Act (RFRA) to argue either that it does not own parish property or to argue that the federal bankruptcy laws should be read to reduce their obligations to the victims.

The Tort Claimants' Committee was appointed pursuant to 11 U.S.C. § 1102. *In re Roman Catholic Archbishop of Portland in Oregon, and Successors, A Corporation Sole*, United States Bankruptcy Court for the District of Oregon, Case No. 04-37154-ELP11. The Committee is appointed to represent the interests of all tort claimants in the bankruptcy case of the Archdiocese. Consequently, it has an interest in ensuring that the Bankruptcy Code is applied to the Archdiocese in the same manner that it is applied to all debtors. The generally applicable process of developing and confirming a plan of reorganization should be applicable to the Archdiocese. The Archdiocese has raised RFRA in multiple contexts in the bankruptcy, most recently in connection with a motion to extend the exclusivity period during which the Debtor alone has the right to file a plan of reorganization. The Archdiocese argued that a refusal by the bankruptcy court to extend the exclusivity period would violate RFRA.

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[1] Counsel for amici are the sole authors of this brief. No person or entity other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

The Official Committee of Tort Litigants was appointed pursuant to 11 U.S.C. § 1102. *In Re Catholic Bishop of Spokane*, United States Bankruptcy Court for the Eastern District of Washington, Case No. 04-08822 PCW11. The Committee is appointed to represent the interests of all creditors who commenced sex abuse litigation against the Diocese prior to December 6, 2004. Consequently, it has an interest in ensuring that the Bankruptcy Code is applied to the Diocese in the same manner that it is applied to all debtors, including but not limited to the standards for determining the scope of the property of the bankruptcy estate and the generally applicable process of developing and confirming a plan of reorganization. The Diocese has raised RFRA in multiple contexts in the bankruptcy, including a reservation of rights under RFRA in the bankruptcy petition itself, its Schedules of Assets and Liabilities and Statement of Financial Affairs (the basic financial disclosure documents required of all debtors) and, most recently, in a declaratory relief action seeking a determination of the scope of the Diocese's interest in property for the purpose of ascertaining the size of the bankruptcy estate.

The Committees have an interest in having this Court address the constitutionality of RFRA. Despite RFRA's violation of the separation of powers and the Establishment Clause, and the fact it exceeds Congress's power, the constitutional issues have been raised by parties in the federal courts of appeals only twice in twelve years. RFRA is a threat to the orderly application of federal bankruptcy law. It is being invoked in the relevant bankruptcies in a way that threatens the even-handed, predictable, and stable application of bankruptcy law for creditors, tort victims, and property owners. As the legislative record

makes clear, RFRA is a wholesale rejection of this Court's free exercise jurisprudence, not legitimate accommodation. In fact, it never occurred to members of Congress that RFRA might become a tool for religious institutions to avoid or reduce claims by tort victims forced through federal bankruptcies. The Committees respectfully request this Court find RFRA unconstitutional.

ARGUMENT

This case presents the first opportunity for this Court to consider the Religious Freedom Restoration Act ("RFRA") since it was declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In the interim, those invoking RFRA have argued that *Boerne* held only that RFRA was unconstitutional as applied to the states, and therefore it remains constitutional as applied to the federal government. The four circuit courts to reach the issue have upheld its constitutionality. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 860 (8th Cir. 1998); *but see La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313, 319 (6th Cir. 2000) (doubting the continued constitutionality of RFRA).[3]

[3] In *O'Bryan* and *In re Young*, the circuit courts reversed the district court findings that RFRA was unconstitutional as applied to the federal government. Other district courts considering the issue of RFRA's continued constitutionality in light of *Boerne* have been split on the issue. *Compare Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999) (reversing district court decision that RFRA was

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Amici respectfully argue that RFRA is not constitutional as applied to federal law, and that this Court should declare it unconstitutional at this time. Amici are aware that this Court generally does not consider issues that have not been considered below, but think that the Court would be justified in considering RFRA's constitutionality *sua sponte* for three reasons.

First, the federal courts have considered constitutional issues *sua sponte*, and particularly in circumstances where the issue would have a dispositive effect on the litigation, as here. In *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002), the circuit court, recognizing the general rule that a court "not consider issues not raised by the parties on appeal," still considered the application of RFRA *sua sponte* as to two defendants who had not properly preserved the issue in an appeal challenging their convictions for possessing prohibited eagle feathers. *Hardman*, 297 F.3d at 1123. There was no hardship in that case, because all parties were given an opportunity to brief the issue. There is ample time for the parties to brief the

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unconstitutional as applied to the federal government) *and United States v. Sandia*, 6 F. Supp. 2d 1278 (D.N.M. 1997), *aff'd*, 188 F.3d 1215 (10th Cir. 1999) (holding RFRA unconstitutional after *Boerne*) *and Waguespack v. Rodriguez*, 220 B.R. 31 (W.D. La. 1998) (holding RFRA unconstitutional after *Boerne*) *and Hodge v. Magic Valley Evangelical Free Church*, 220 B.R. 386 (D. Idaho 1998) (reversing bankruptcy judge's finding that RFRA was unconstitutional after *Boerne*) *with Gary S. v. Manchester School District*, 241 F. Supp. 2d 111 (D.N.H. 2003), *aff'd*, 374 F.3d 15 (1st Cir. 2004) (finding RFRA claim viable after *Boerne*) *and Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (holding RFRA claim viable after *Boerne*) *and United States v. Ramon*, 86 F. Supp. 2d 665 (W.D. Tex. 2000) (assuming RFRA claim viable after *Boerne*) *and Jama v. United States*, 343 F. Supp. 2d 338 (D.N.J. 2004) (holding RFRA claim viable after *Boerne*).

issue before this Court, and the government, at least, has argued the constitutionality of RFRA many times in the past.

Even where the parties have not briefed an issue because there was no divergence in their positions, this Court has held that it was not improper to consider the validity of a law if such a determination would be dispositive. *See United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 447-48 (1993). To do otherwise, would allow litigants in these cases to keep this issue from the Court, and lead courts to engage in extensive statutory interpretation involving a law that has no basis in Congress's powers. *Id.* at 447.

Second, the issue of RFRA's constitutionality, as important as it is, is difficult to get before a court. In the vast majority of cases, neither party has an interest in challenging its constitutionality. The federal government is obliged to defend it, and the religious entity seeks RFRA's privileges. It is a classic example of an important constitutional question that is "capable of repetition, yet of evading review." *See, e.g., Olmstead v. L. C. by Zimring*, 527 U.S. 581, 594 n.6 (1999); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546-57 (1976); *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). In the twelve years since its enactment, only two parties have challenged its constitutionality in the federal courts of appeals, and one of those involved a territory. *See Guerrero*, 290 F.3d at 1219 (territory challenged RFRA's constitutionality as applied to its laws forbidding the importation of marijuana, which were applied to a Rastafarian); *In re Young*, 141 F.3d at 857 (bankruptcy trustee). RFRA blankets all federal laws, and it is apparent that in

the vast majority of cases, its constitutionality – even though highly questionable – has been ignored.

Third, the question of Congress's power is an issue of overriding importance. *Boerne*, 521 U.S. at 516 ("The powers of the legislature are defined, and limited. . . . The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.") (quoting *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803)); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("Because of the importance of the [Commerce Clause] issue," the Court granted certiorari and affirmed the Fifth Circuit's decision). Where, as here, review of that question is difficult, it makes sense for this Court to address this fundamental question of Congress's power to enact RFRA before applying the statute to this narrow set of facts.

For the foregoing reasons, Amici urge this Court to consider and reach the issue of RFRA's constitutionality. If this Court were not to determine RFRA's constitutionality in this case, Amici respectfully urge this Court to reserve expressly the question of its constitutionality.

I. THE RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE SEPARATION OF POWERS

With RFRA, Congress intended to step into this Court's shoes and to become the final word on the meaning of the Free Exercise Clause. RFRA's stated purpose is to displace this Court's controlling free exercise precedent in *Employment Div. v. Smith*, 494 U.S. 872 (1990), with constitutional standards preferred by Congress. By its terms, it is intended "to restore the compelling interest

test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened[.]" 42 U.S.C. § 2000bb(b)(1) (2005). This is a frank usurpation of this Court's critical role in interpreting the meaning of the Constitution. As the Court stated in *Boerne*:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Boerne, 521 U.S. at 536.

It is hard to understand how the discussion in *Boerne* regarding *Marbury v. Madison* can mean anything other than that Congress exceeded its power in all of RFRA's applications. As this Court made quite clear in *Boerne*, Congress wandered far out of bounds when it arrogated to

itself the power to reverse a Supreme Court interpretation of the First Amendment. *Id.* at 535-36. That logic applies whether Congress was usurping this Court's power to interpret the First Amendment as applied to state law or to federal law.

Those courts upholding RFRA against a separation of powers attack have reasoned that the separation of powers reasoning in *Boerne* does not apply to federal law. Their reasoning is not persuasive. Without a doubt, *Boerne* held that the separation of powers was violated when Congress acted pursuant to Section 5 of the Fourteenth Amendment to enact RFRA. *Id.* Under Section 5, Congress is empowered to enact remedial statutes to redress constitutional violations that are widespread and persisting in the states. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 518-19 (2004). This is the one provision of the Constitution that gives Congress the power to regulate the states directly and to police the Constitution. But even with this explicit delineation of power, this Court held that Section 5 grants no power to Congress to take over the Court's role. *Boerne*, 521 U.S. at 536. The enumerated powers give no more authority to overtake this Court's role than would Section 5. Contrary to the faulty reasoning of some courts, the "Necessary and Proper Clause" is not an independent provision that permits Congress to alter at will its role in the federal scheme. *See, e.g., O'Bryan*, 349 F.3d at 401 ("legislation affecting the internal operations of the national government does not depend on § 5; it rests securely on Art. I § 8 cl. 18, which authorizes Congress 'to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.' This permits Congress to

determine how the national government will conduct its own affairs."); *Guerrero*, 290 F.3d at 1220 ("Congress derives its ability to protect the free exercise of religion from its plenary authority found in Article I of the Constitution; it can carve out a religious exemption from otherwise neutral, generally applicable laws based on its power to enact the underlying statute in the first place."); *Kikumura*, 242 F.3d at 959 (10th Cir. 2001) ("These separation of powers concerns the Court expressed in *Flores*, however, do not apply to RFRA as applied to the federal government. Congress' power to apply RFRA to the federal government comes not from its ability to enforce the Fourteenth Amendment but rather from its Article I powers."). Rather, the Necessary and Proper Clause only hands Congress the power to effectively exercise one of its enumerated powers. *See, e.g., Gonzales v. Raich*, No. 03-1454, 2005 U.S. LEXIS 4656, at *59-60 (U.S. June 6, 2005); *Sabri v. United States*, 541 U.S. 600, 606-07 (2004).

RFRA has the scope of a constitutional rule, and is in fact a constitutional amendment by fiat in contravention of Article V, which requires Congress and the states to obtain supermajorities to amend the Constitution.[3] RFRA puts the Free Exercise Clause,

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[3] "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State,

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> on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it. *Marbury v. Madison*, 1 Cranch at 177. . . . [If RFRA were good law, s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.
>
> *Boerne*, 521 U.S. at 529.

Instead of following Article V's onerous procedures to amend the Constitution, Congress decided that it would alter the meaning of the Free Exercise Clause through its simple majority procedures. There is absolutely no evidence that it was passed with anywhere near the numbers required to initiate the amendment process, because it was passed pursuant to the "unanimous consent" procedure in both Houses of Congress, which, ironically enough, does not mean it was passed unanimously. Rather, "unanimous consent" is an oral vote typically within virtually empty chambers. No member's vote was recorded and no member needed to be present during the voice vote. By enacting RFRA, Congress – the body expressly limited by the First Amendment – arrogated to itself the power to dictate by fiat free exercise rights. *See* Edward J. W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of Boerne v. Flores*, 98 Colum. L. Rev. 1410, 1452-60 (1998).

RFRA also violates the separation of powers because it imposes strict scrutiny on neutral, generally applicable

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without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. Const. art. V.

laws, which, in any other circumstance, are laws that are presumptively constitutional. *Locke v. Davey*, 540 U.S. 712, 720 (2004). RFRA directs the courts to treat all legislative acts as though they are probably illegal, and therefore dramatically shifts the balance of power toward the courts. It subverts the usual presumption that congressional acts are constitutional. *See, e.g., Reno v. Condon*, 528 U.S. 141, 148 (2000) ("We of course begin with the time-honored presumption that the [statute] is a 'constitutional exercise of legislative power.'") (quoting *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883)); *INS v. Chadha*, 462 U.S. 919, 944 (1983).

In general, the courts' use of such a "highly suspect tool" to examine legislative action is justified only if there is good reason to suspect the law is unconstitutional. Strict scrutiny under the First Amendment traditionally has been reserved for laws that are presumptively unconstitutional, because they have suspect features. For example, in the speech context, strict scrutiny has been reserved for laws that engage in content or viewpoint discrimination. *See, e.g., R. A. V. v. St. Paul*, 505 U.S. 377, 391 (1992); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *see also City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."). Laws that are neutral toward speech receive considerably lower level scrutiny. *See, e.g., Virginia v. Black*, 538 U.S. 343, 362 (2003); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). As this Court explained recently, the Free Exercise Clause mandates strict scrutiny only where a law is appropriately treated as presumptively unconstitutional because it evidences

"hostility or animus" against religion. *Locke*, 540 U.S. at 724. Despite the absence of hostility or animus in a neutral, generally applicable statute, RFRA forces courts to treat legislative enactments with deep suspicion.[4] That is a dramatic alteration in the constitutionally established relationship between this Court and the Congress.

Some might argue that Congress can order the courts to treat its enactments as though they are presumptively illegal, because it is, after all, impacting only its own work. How could Congress be overstepping it bounds when it is in fact reducing its own power, they might argue. But the separation of powers draws a boundary line between the branches, and Congress may no more hand the courts power they lack than it may overstep its own power. "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992); *see also Clinton v. City of New York*, 524 U.S. 417, 451-52 (1998) (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power

[4] RFRA on this score is unlike the institutional provisions of RLUIPA recently upheld in *Cutter*. There, the statutory standard is not the equivalent of strict scrutiny in the constitutional context. Rather, this Court interpreted the statutory terms in light of their legislative history to conclude that RLUIPA requires a high degree of deference to institutional expertise and interests. The courts, under RLUIPA, therefore, are to treat prison regulations as though they are presumptively legal. *Cutter*, No. 03-9877, 2005 U.S. LEXIS 4346, at *4, 25, 28 n.13.

it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. . . . Abdication of responsibility is not part of the constitutional design.") (citations omitted).

II. THE RELIGIOUS FREEDOM RESTORATION ACT IS BEYOND CONGRESS'S POWER

"'Universal' in its coverage, RFRA 'applied to all Federal and State law,' [citation], but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds." *Cutter*, No. 03-9877, 2005 U.S. LEXIS 4346, at *11 (quoting *Boerne*, 521 U.S. at 516); *Id.* at *31 n.2 (Thomas, J., concurring). Under *United States v. Lopez*, 514 U.S. 549 (1995), Congress is required, at a minimum, to consider the constitutional base of its authority to enact a law, especially where, as here, its power is not readily apparent on its face. *Lopez*, 514 U.S. at 562-63. Congress assumed that its power under Section 5 of the Fourteenth Amendment covered RFRA in toto, as it never considered what its power might be beyond Section 5. This is a severe misunderstanding of its power; Section 5, by its terms, permits Congress to regulate state law for the purpose of enforcing constitutional rights. It does not provide the power to regulate federal law. Rather, with respect to federal law, its power must be derived from one of its enumerated powers. And Congress never considered what power might support RFRA as applied to federal law. *Id.*; *United States v. Morrison*, 529 U.S. 598, 612 (2000).

The only remotely arguable base for RFRA's regulation of federal law is the Commerce Clause, as no other Clause, *e.g.*, the Spending Clause, is implicated by its provisions. *Cf.* RLUIPA, 42 U.S.C. §§ 2000cc(a)(2)(A); 2000cc-2(b)(1) (2005); *Cutter v. Wilkinson*, No. 03-9877, 2005 U.S. LEXIS 4346, at *31 (U.S. May 31, 2005) (Thomas, J., concurring).

The Commerce Clause, by its terms, provides Congress with the authority to enact legislation to regulate commerce with foreign nations, among the states and with the Indian tribes. U.S. Const. art. I § 8, cl.3.

This Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. *See Lopez*, 514 U.S. 549. The first two categories involve laws that either "regulate the use of the channels of interstate commerce" or "regulate and protect the instrumentalities of interstate commerce, and the persons or things in interstate commerce, even though the threat may come only from intrastate activities," such as interstate highways, telecommunications, shipping, etc. *Id.* at 561. RLUIPA does not fit into either of these two categories. The third category includes the power to regulate intrastate activities where the activity has a substantial effect on interstate commerce. *Id.* at 559. The Court has stated that this last category includes only those activities that are economic in nature. *Raich*, No. 03-1454, 2005 U.S. LEXIS 4656, at *29-32 ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."); *Morrison*, 529 U.S. at 619 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Reno v. Condon*, 528 U.S. 141, 148 (2000) ("Because drivers' information is, in this context, an article of commerce, its sale or release into the

interstate stream of business is sufficient to support congressional regulation."); *Lopez*, 514 U.S. at 561 (The Gun-Free School Zones Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.").

Five years after *Lopez*, the Supreme Court overturned the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000), and "established what is now the controlling four-factor test for determining whether a regulated activity 'substantially affects' interstate commerce." *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003). When considering whether a statute is consistent with the Commerce Clause Power, the determinative factors have been:

> 1) [W]hether the statute in question regulates commerce 'or any sort of economic enterprise'; 2) whether the statute contains any 'express jurisdictional element which might limit its reach to a discrete set' of cases; 3) whether the statute or its legislative history contains 'express congressional findings' that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and substantial effect on interstate commerce is 'attenuated'.

Id. (quoting *Morrison*, 529 U.S. 598, 610-12 (2000)).

RFRA fails all four of these factors. As discussed in more detail below, it regulates non-economic activity. Moreover, it goes without saying that it has no jurisdictional element; it provides no "express congressional findings" that the free exercise of religion substantially affects commerce; and any link between the free exercise of religion, especially as considered by Congress, and a substantial effect on commerce is attenuated, to say the least.

RFRA regulates that which is not economic in nature, and therefore cannot be valid legislation under the Commerce Clause. *Raich*, No. 03-1454, 2005 U.S. LEXIS 4656, at *45; *Morrison*, 529 U.S. at 610; *Jones v. United States*, 529 U.S. 848, 850-51 (2000); *Lopez*, 514 U.S. at 551. RFRA replicates a constitutional standard of judicial review – it regulates the free exercise of religion, just as a court would. When a court applies constitutional standards of review, it is applying the standard to a law. It is not regulating private conduct, as Congress is permitted under its enumerated powers, but rather regulating law. Law is not economic in nature. *See Condon*, 528 U.S. at 149-51. RFRA, therefore, lacks any "nexus with interstate commerce." *Lopez*, 514 U.S. at 562 (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971)); *Morrison*, 529 U.S. at 615-16; *Printz v. United States*, 521 U.S. 898, 924 (1997).

RFRA directly regulates federal law and, therefore, does not regulate that which is economic. It indirectly affects private, religiously motivated conduct, which, again, is not economic in nature. The only examples Congress considered do not begin to account for a "substantial" effect on commerce. For example, the few anecdotes of religious conduct in RFRA's legislative history, involving mandatory autopsies and land use requirements, do not substantially affect commerce individually or in the aggregate. They are non-economic actions undertaken by individual members of nonprofit institutions and motivated by faith, not economic gain. *See Boerne*, 521 U.S. at 530-31 (documenting legislative history of RFRA).

Like the Gun-Free School Zones Act at issue in *Lopez* and the Violence Against Women Act in *Morrison*, RFRA,

> by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. [RFRA] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.
>
> *Lopez*, 514 U.S. at 561 (footnote omitted); *see also Morrison*, 529 U.S. at 617-18.

Because the activity regulated by RFRA is non-economic in nature, its aggregation cannot "substantially affect" interstate commerce.

The universe of that which may be regulated permissibly pursuant to the Commerce Clause must "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558. Although individual instances of economic activity may not by themselves substantially affect interstate commerce, their aggregation may. *Wickard v. Filburn*, 317 U.S. 111 (1942). As this Court recently held, this is particularly true where that which is being regulated impacts upon a larger federal scheme affecting commerce. *Raich*, No. 03-1454, 2005 U.S. LEXIS 4656, at *31-32 (holding that state law permitting medical marijuana interfered with the federal government's comprehensive federal regulation of illegal drugs and therefore could be regulated under the Commerce Clause). Here, there is no comprehensive federal scheme to regulate religious conduct, in no small part because the First Amendment is a *limitation* on Congress's power to regulate religious belief, not an enumerated power. *Cutter*, 2005 U.S. LEXIS 4346, at

*34-35 (Thomas, J., concurring). Moreover, RFRA's indirect regulation of religiously motivated conduct is not economic in nature and therefore any aggregation does not result in a substantial effect on commerce. *See Morrison*, 529 U.S. at 617-18; *see also McCoy*, 323 F.3d at 1122 (possession of a single pornographic picture of a child "was purely non-economic and non-commercial" and was not analogous to the aggregation in *Wickard*).

Any effect on commerce regulated by RFRA is so attenuated that it simply cannot be a sufficient basis on which to justify RFRA as a legitimate exercise of Congress's power under the Commerce Clause. Here are the targets of RFRA, according to Congress: religious beliefs that conflict with mandatory autopsies; local zoning; and historic preservation laws. *See Boerne*, 521 U.S. at 530-31. For this Court to find an economic element in RFRA, it can do nothing other than "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

Those seeking to justify RFRA argue that it was a proper exercise of Congress's power under the Necessary and Proper Clause. U.S. Const. art. I § 8, cl. 18. However, this Court's holding in *Boerne* illustrates how this legislation fails under this Clause. *See* Eugene Gressman, Symposium, *RFRA: A Comedy of Necessary and Proper Errors*, 21 Cardozo L. Rev. 507 (1999). In *McCulloch v. Maryland*, 17 U.S. 316 (1819), Chief Justice Marshall set forth the following test:

> [T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.
>
> *McCulloch*, 17 U.S. at 421.

As Professor Gressman points out, RFRA does not satisfy this test:

> The Supreme Court long warned that any federal statute, or any amendment to a federal statute, emanating from the Necessary and Proper Clause power to 'carry[] into Execution the foregoing [Article I] Powers,' must heed and comply with all other relevant constitutional provisions. Since RFRA still contains all the elements of a separation of powers violation, RFRA cannot be considered a valid or 'proper' amendment to . . . any other federal law enacted in execution of an Article I power of Congress.
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> Gressman, *supra*, at 528 (quoting *McCulloch*, 17 U.S. at 421).

If this Court were to uphold RFRA as a valid exercise of Congress's Commerce power, it would open new doors for Congress to takeover this Court's authority to interpret constitutional requirements in a wide array of cases. For example, if RFRA is good law, then Congress may enact the Ultimate Free Speech Act, which would impose strict scrutiny on every federal law with an impact on speech, and thereby, open military bases to dissenting speakers,

Greer v. Spock, 424 U.S. 828 (1976), not to mention this Court's grounds. *United States v. Grace*, 461 U.S. 171 (1983) (holding law prohibiting speech in front of Supreme Court building unconstitutional because the sidewalks, which were public forums, were included in the ban). Such a law would overturn, at a minimum, this Court's decision involving expressive conduct in *United States v. O'Brien*, 391 U.S. 367 (1968), where this Court applied intermediate scrutiny to government regulation of the burning of draft cards. The setting of these constitutional standards of review simply is not Congress's role in the federal scheme.

III. THE RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE ESTABLISHMENT CLAUSE

Unlike any accommodation statute ever upheld by this Court, RFRA has no boundaries. Rather, by its terms, it blankets every law in the country. When enacted, RFRA's "mandate applie[d] to any 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,' as well as to any 'State, or . . . subdivision of a State.'" *Boerne*, 521 U.S. at 516 (quoting 42 U.S.C. § 2000bb-2(1) as enacted). After this Court in *Boerne* held RFRA unconstitutional, Congress amended RFRA to clarify that it intended RFRA, nevertheless, to apply to every federal government action: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . " unless the restriction "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (2005). "[T]he term 'government' includes a branch, department,

agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2 (2005). Assuming that *Boerne* is limited to its constitutionality as applied to state law, the reenacted RFRA still blankets all federal law. It forces accommodation on every conceivable federal statute, executive action, or judicial order. "'Universal' in its coverage, RFRA 'applied to all Federal and State law,' [citation], but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds." *Cutter*, No. 03-9877, 2005 U.S. LEXIS 4346, at *11 (quoting *Boerne*, 521 U.S. at 516); *Id.* at *31 n.2 (Thomas, J., concurring).

This Court recently upheld the most expansive legislative accommodation it has ever considered, the prison provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). Yet, that legislative accommodation pales in comparison to the scope of RFRA. Almost immediately after this Court's decision in *Boerne*, Congress introduced the Religious Liberty Protection Act (RLPA), which attempted to enact a law with RFRA's scope under the Commerce Clause. *See* Religious Liberty Protection Act of 1998, S. 2148, H.R. 4019, 105th Cong. (1998). In the end, however, Congress was unwilling to enact another law with RFRA's scope. Instead, it enacted a law invoking RFRA's standard, but limited to two categories of law, local land use law and government institutions such as prisons and government-run health institutions. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 332-34 (2003).

Under RLUIPA's institutional persons provisions, Congress mandated accommodation within a single category of regulation – government-run institutions. In strong contrast, RFRA covers every conceivable category of regulation. This Court has never upheld an accommodation that sweeps so broadly, nor should it.

Before *Cutter*, this Court upheld a considerably narrower accommodation: the exemption to Title VII that permits religious entities to discriminate on the basis of religious belief in their hiring decisions.[5] *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). This Court also has approved in dictum a practice-specific accommodation, which permits religious believers to use peyote during religious exercises. *Smith*, 494 U.S. at 890. None of the accommodations upheld to date begins to approximate RFRA's reach. Quite literally, it is blind accommodation, that is, with RFRA, Congress mandated accommodation without any apparent knowledge of the actual operation of the accommodation in the vast majority of its applications. It is far closer to a blind handout intended to privilege religious entities above neutral, generally applicable laws than an accommodation crafted to lift any known burden on religious exercise. As the legislative history reveals,

[5] Title VII permits religious entities to hire only co-religionists. 42 U.S.C. § 2000e-1 (2005) ("This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."). Religious entities are still required to abide by Title VII's other prohibitions on discrimination on the basis of "race, color, . . . sex, or national origin." 42 U.S.C. § 2000e-2 (2005).

Congress enacted RFRA for the purpose of overturning this Court's decision in *Employment Div. v. Smith*, and not because it had any knowledge regarding the likely impact of the *Smith* rule on state or federal law. It considered, at most, a handful of anecdotes, most of which involved state, and not federal, law. As this Court stated:

> RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. See, *e.g.*, Religious Freedom Restoration Act of 1991, Hearings on H. R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess., 331-334 (1993) (statement of Douglas Laycock) (House Hearings); The Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 30-31 (1993) (statement of Dallin H. Oaks) (Senate Hearing); Senate Hearing 68-76 (statement of Douglas Laycock); Religious Freedom Restoration Act of 1990, Hearing on H. R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess., 49 (1991) (statement of John H. Buchanan, Jr.) (1990 House Hearing). The absence of more recent episodes stems from the fact that, as one witness testified, 'deliberate persecution is not the usual problem in this country.' House Hearings 334 (statement of Douglas Laycock). See also House Report 2 ('Laws directly targeting religious practices have become increasingly rare'). Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion centered upon

anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, see, *e.g.*, House Hearings 81 (statement of Nadine Strossen); *id.*, at 107-110 (statement of William Yang); *id.*, at 118 (statement of Rep. Stephen J. Solarz); *id.*, at 336 (statement of Douglas Laycock); Senate Hearing 5-6, 14-26 (statement of William Yang); *id.*, at 27-28 (statement of Hmong-Lao Unity Assn., Inc.); id., at 50 (statement of Baptist Joint Committee); see also Senate Report 8; House Report 5-6, and n.14, and on zoning regulations and historic preservation laws (like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues. See, *e.g.* House Hearings 17, 57 (statement of Robert P. Dugan, Jr.); *id.*, at 81 (statement of Nadine Strossen); *id.*, at 122-123 (statement of Rep. Stephen J. Solarz); *id.*, at 157 (statement of Edward M. Gaffney, Jr.); *id.*, at 327 (statement of Douglas Laycock); Senate Hearing 143-144 (statement of Forest D. Montgomery); 1990 House Hearing 39 (statement of Robert P. Dugan, Jr.); see also Senate Report 8; House Report 5-6, and n.14. It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation. See House Report 2; Senate Report 4-5; House Hearings 64 (statement of Nadine Strossen); *id.*, at 117-118 (statement of Rep. Stephen J. Solarz); 1990 House Hearing at 14 (statement of Rep. Stephen J. Solarz).

Boerne, 521 U.S. at 530-31.

The vast majority of the legislative history is in fact invective against this Court's interpretation of the Free Exercise Clause. For example: The *Smith* decision was "a dastardly and unprovoked attack on our first freedom." 137 Cong. Rec. E2422 (daily ed. June 27, 1991) (statement of Rep. Stephen Solarz). "*Smith* was a devastating blow to religious freedom, and we are trying to undo it." 139 Cong. Rec. H2360 (daily ed. May 11, 1993) (statement of Rep. Schumer). "This landmark legislation will overturn the Supreme Court's disastrous decision, *Employment Division versus Smith*, which virtually eliminated the first amendment's protection of the free exercise of religion." 139 Cong. Rec. H2359 (daily ed. May 11, 1993) (statement of Rep. Nadler). *See also* 139 Cong. Rec. H2361 (daily ed. May 11, 1993) (statement of Rep. Hoyer) ("This ruling did great mischief to the rights of all Americans. Religious liberty [is] no longer a fundamental constitutional right."); 139 Cong. Rec. S14464 (daily ed. October 27, 1993) (statement of Sen. Coats) ("The Court has effectively turned religious Americans into second class citizens."). RFRA's legislative history contains no less than 405 pages explicitly referencing *Smith*. *See, e.g.*, The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2, 8, 9, 11, 22, 28-29, 31-32, 35, 38, 41, 48, 49, 51, 61 (1990); The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 7, 8, 19, 23, 32, 39, 45, 63, 99, 136, 160, 175, 193, 201, 214, 249, 251, 271 (1992); Remarks on Signing the Religious Freedom Restoration Act of 1993, II Pub. Papers 2000 (Nov. 16, 1993).

The institutionalized persons provisions of RLUIPA are readily distinguishable, as this Court noted in the *Cutter* opinion. While RFRA's scope is breathtaking, RLUIPA's prison provisions address a significantly more defined category of regulation. Moreover, RLUIPA's prison provisions passed muster under the Establishment Clause, because they addressed "exceptional government-created burdens," where the state held complete control over whether an individual would even be permitted to engage in worship. *Cutter*, at *19; *McCreary County v. ACLU of Kentucky*, No. 03-1693, 545 U.S. ___ (2005), slip op. at 27 (U.S. June 27, 2005). That is not true of the few anecdotes considered by Congress, or of the vast majority of the laws affected by RFRA. RFRA sweeps much more broadly as it brings under its umbrella any religious conduct that may be substantially burdened by a federal law, a category that far exceeds the question whether worship will occur in any form at all. For example, RFRA is being invoked in the Portland Archdiocese and Spokane Diocese bankruptcies by the Debtors, to argue that the ownership of parish property must be determined according to canon law. The issue there is not whether the Archdiocese will be able to worship, but whether it will be able to avoid including parish properties within the Debtor's estate.

This Court further read RLUIPA's statutory language in light of its legislative history and as requiring strong deference to prison authorities' "expertise" and institutional interests. *Cutter*, at *24-28, n.13 ("deference is due to institutional officials' expertise in this area."); *id.* at *29-30. ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective

functioning of an institution, the facility would be free to resist the imposition [of RLUIPA].").

RFRA does not contain in its legislative history the sort of limiting language that satisfied the Court in *Cutter* that the accommodation was adequately tailored to the known threat to religious exercise. Therefore, the most expansive legislative accommodation yet upheld – Section 3 of RLUIPA – cannot begin to justify RFRA's sweep through every federal law, executive decision, or judicial determination.

The one court to have upheld RFRA as applied to federal law against Establishment Clause challenge followed specious reasoning by assuming that RFRA does no more than "preserve First Amendment values." *In re Young*, 141 F.3d at 862-63. The truth, of course, is that it does not "preserve" such values, but rather radically expands them, well beyond constitutional requirements. The purpose and effect are unconstitutional. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

As this Court recently reaffirmed, "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context. . . ." *McCreary*, slip op. at 26. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *Id.* at 11. The effect of RFRA is to advance religion across all policies, the vast majority of which Congress never considered. It is not permissible accommodation, but rather a blind handout.

The fact that RFRA is a self-imposed limitation on Congress does not solve its Establishment Clause infirmities. No government has immunity to Establishment Clause analysis simply because the law itself also places a burden on the government. For example, the sales tax exemption for religious periodicals addressed by this Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), limited the state's ability to collect taxes, but that willingness to forego taxes was not sufficient to validate the tax exemption. Under existing Establishment Clause precedents, as discussed above, RFRA simply cannot pass muster.

Neither the state supreme courts nor this Court have applied strict scrutiny to every law in the jurisdiction. Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. Pa. J. Const. L. 1, 6-7 (1998); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1494-1503 (1999); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1247 (1994) (calling strict scrutiny "strict in theory but feeble in fact"); Ira C. Lupu, *The Trouble With Accommodation*, 60 Geo. Wash. L. Rev. 743, 756 (1992) ("strict in theory, but ever-so-gentle in fact."). This Court declined to apply strict scrutiny, even during the *Sherbert* and *Yoder* era covering 1963 to 1990, to cases involving the military, *Goldman v. Weinberger*, 475 U.S. 503 (1986), prison regulations, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), federal regulation, including land use, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and administration of social services. *Bowen v. Roy*, 476 U.S. 693 (1986). A holding in this case that RFRA's

legislative mandate to apply strict scrutiny to every neutral, generally applicable law ever enacted by Congress would be irrelevant to the way in which strict scrutiny has been applied, in fact, under the state and federal free exercise clauses.[6]

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[6] If this Court were to hold that RFRA as applied to federal law violates the Establishment Clause, some might argue it will endanger some of the state religious freedom acts patterned after the federal RFRA. But it would only affect those few that apply strict scrutiny across all laws, with no exceptions. There are only a handful that mimic RFRA by subjecting every law in the state to strict scrutiny. *See* Ariz. Rev. Stat. Ann. § 41-1493 (2004); Conn. Gen Stat. Ann. § 52-571b (2004); R.I. Gen. Laws § 42-80.1-3 (2005); N.M. Stat. Ann. § 28-22-3 (2005); Ala. Const. amend. 622. *Cf.* Fla. Stat. Ann. § 761.05(4) (2005) (exception for drug laws); Idaho Code § 73-403(2) (2004) (allows for prospective exceptions in laws passed after effective date); 775 Ill. Comp. Stat. Ann. § 35/30 (2005) (exception for O'Hare zoning); Okla. Stat. tit. 51, § 254 (Supp. 2004) (compelling state interest presumed in correctional facilities); S.C. Code Ann. § 1-32-45 (2004) (exception for inmate litigation); Mont. Code § 1.307 (2005) (exception for physical injury, possession of a weapon, child support, and medical neglect); Tex. Civ. Prac. & Rem. Code § 110.010 (2004) (exception for zoning); 71 Pa. Const. Stat. Ann. 2406 (2004) (exception for criminal offenses, controlled substances, and motor vehicle laws). Two such state laws are obviously unconstitutional under the Establishment Clause, because they mandate strict scrutiny to the benefit of religious entities against every generally applicable law even when there is no substantial burden on religious conduct. Rather, they trigger strict scrutiny on the basis of de minimis burdens on religious conduct. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-571b (2004); Ala. Const. amend. 622. Of course, these state laws might be constitutional, regardless of this Court's ruling on the federal RFRA, under Justice Thomas's view that the Establishment Clause is not incorporated into the Fourteenth Amendment. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330-31 (2004) (Thomas, J., concurring).

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court declare the Religious Freedom Restoration Act as applied to federal law unconstitutional.

Respectfully submitted,

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